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In the Supreme Court of the United States

OCTOBER TERM, 1982

LYNN G. WALCK, PETITIONER

v.

AMERICAN STOCK EXCHANGE, INC., and
NEW YORK STOCK EXCHANGE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

JEROLD J. GANZFRIED
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ELIZER B. WALTER
Assistant General Counsel

RICHARD A. KELBY
Senior Special Counsel

Securities and Exchange Commission
Washington, D.C. 20549

QUESTION PRESENTED

Whether, prior to the Securities Acts Amendment of 1975, investors had a private right of action against a registered national securities exchange under Section 6 of the Securities Exchange Act for damages caused by the exchange's failure to enforce its rules.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Aldrich v. *NYSE*, 446 F. Supp. 348	14
Arneil v. *Ramsey*, 550 F.2d 774	14
Baird v. *Franklin*, 141 F.2d 238, cert. denied, 323 U.S. 737	7, 8, 9, 13, 15, 17
Bright v. *Philadelphia-Baltimore-Washington Stock Exchange*, 327 F. Supp. 495	14
Butterman v. *Walston & Co.*, 387 F.2d 822, cert. denied, 391 U.S. 913	13
Caddell v. *Goodbody & Co.*, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,938	14
Cannon v. *University of Chicago*, 441 U.S. 677	10, 11
Carr v. *NYSE*, 414 F. Supp. 1292	14
Collins v. *Philadelphia-Baltimore-Washington Stock Exchange, Inc.*, 408 F. Supp. 1344	14
Colonial Realty Corp. v. *Bache & Co.*, 358 F.2d 178, cert. denied, 385 U.S. 817	13
Cort v. *Ash*, 422 U.S. 66	5, 6, 8, 9, 10, 11, 12
Evans v. *Kerbs & Co.*, 411 F. Supp. 616	14
Fischer v. *NYSE*, 408 F. Supp. 745	14
Goodman v. *H. Hentz & Co.*, 265 F. Supp. 440	15
Herman & MacLean v. *Huddleston*, No. 81-680 (Jan. 24, 1983)	10, 11, 12, 17
Hochfelder v. *Midwest Stock Exchange*, 503 F.2d 364, cert. denied, 419 U.S. 875	13, 15
Hughes v. *Dempsey-Tegeler & Co.*, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,133, aff'd, 534 F.2d 156, cert. denied, 429 U.S. 896	10, 13-14, 15
Kardon v. *National Gypsum Co.*, 69 F. Supp. 512	15
Kroese v. *NYSE*, 227 F. Supp. 519	14
Lank v. *NYSE*, 548 F.2d 61	10, 14

Cases—Continued Page

Leist v. *Simplot*, 638 F.2d 283 17
Marbury Management, Inc. v. *Alfred Kohn, Wood, Walker & Co.*, 373 F. Supp. 140 13
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, No. 80-203 (May 3, 1982) 6, 7, 8, 9, 10, 11, 15, 16, 17
Murphy v. *McDonnell & Co.*, 553 F.2d 292 14
NYSE v. *Sloan*, 394 F. Supp. 1303 13
O'Neill v. *Maytag*, 339 F.2d 764 13
Pettit v. *Amex*, 217 F. Supp. 21 .....7, 8, 14
Phillips v. *Amex*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,035 13
Pittsburgh Terminal Corp. v. *Baltimore & O. R.R.*, 509 F. Supp. 1002, rev'd, 680 F.2d 933, cert. denied, No. 82-622 (Nov. 29, 1982) 14
P.J. Taggares & Co. v. *New York Mercantile Exchange*, 476 F. Supp. 72 14
Rich v. *NYSE*, 379 F. Supp. 1122 13
Rich v. *NYSE*, 509 F. Supp. 87 14
Rolf v. *Blyth Eastman Dillon & Co., Inc.*, 424 F. Supp. 1021, aff'd in part, 570 F.2d 38, cert. denied, 439 U.S. 1039 14
Seligson v. *New York Produce Exchange*, 378 F. Supp. 1076, aff'd *sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762, cert. denied, 434 U.S. 823 17
Smith v. *Smith, Barney, Harris, Upham & Co.*, 505 F. Supp. 1380 14
Steinberg v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,599 13
Texas & P. Ry. v. *Rigsby*, 241 U.S. 33 ..... 8, 9
Verace v. *NYSE*, 478 F. Supp. 1061 14
Weinberger v. *NYSE*, 335 F. Supp. 139 14

Statutes, rules and regulation:

Securities Act of 1933, Section 16, 15 U.S.C. 77p.. 10-11
Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 104 .....5, 7, 8, 9, 12, 15, 17

Statutes, rules and regulation—Continued Page

Securities Exchange Act of 1934, 15 U.S.C. (& Supp. V) *et seq.*:

Section 2, 15 U.S.C. 78b 12
Section 6, 15 U.S.C. 78f ..... *passim*
Section 6(b), 15 U.S.C. (1970 ed.) 78f(b) 13
Section 6(b), 15 U.S.C. 78f(b) 13
Section 6(d), 15 U.S.C. (1970 ed.) 78f(d) 10, 13
Section 9(e), 15 U.S.C. 78i(e) 6, 10
Section 10(b), 15 U.S.C. 78j(b) 12
Section 16(b), 15 U.S.C. 78p(b) 6, 10
Section 18, 15 U.S.C. 78r 6, 10
Section 19(a)(1), 15 U.S.C. (1970 ed.) 78s(a)(1) 13
Section 19(g)(1), 15 U.S.C. 78s(g)(1) 13
Section 21(d), 15 U.S.C. 78u(d) 12, 13
Section 28(a), 15 U.S.C. 78bb(a) 11

17 C.F.R. 240.10b-5 ..... 14, 15

Miscellaneous:

S. Rep. No. 94-75, 94th Cong., 1st Sess. (1975) 16
Staff of the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Securities Industry Study* (Comm. Print 1973) 16

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-834

LYNN G. WALCK, PETITIONER

v.

AMERICAN STOCK EXCHANGE, INC., and
NEW YORK STOCK EXCHANGE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. This is a class action brought against respondents New York Stock Exchange, Inc ("NYSE") and American Stock Exchange, Inc. ("Amex") by petitioner Lynn G. Walck, on behalf of himself and certain other customers of the now bankrupt broker-

dealer Edwards & Hanly, which was a member of both exchanges. The class consists of customers who maintained accounts with that firm and purchased common stock of Trans-Lux Corporation through Edwards & Hanly from January 1, 1969 through January 16, 1974 (Pet. App. A11; C.A. App. A-13). According to the allegations of the complaint, Edwards & Hanly engaged in intensive promotion of the purchase of large amounts of Trans-Lux common stock to the maximum extent permitted by applicable margin rules (Pet. App. A9; C.A. App. A-21). As a result of this promotion, Edwards & Hanly and its customers increased their holdings in Trans-Lux stock to approximately 152,000 shares or 15% of outstanding Trans-Lux stock in 1971, and to approximately 500,000 shares or 25% of the outstanding stock as of June 1973 (Pet. App. A9-A10; C.A. App. A-22 to A-23, A-28).

The complaint alleges, among other things, that the respondents violated Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. 78f, because they knew or should have known that Edwards & Hanly was violating exchange rules and failed to enforce compliance with those rules by the firm (C.A. App. A-36 to A-43). Two principal violations of exchange rules by Edwards & Hanly are alleged. First, it is said that the firm violated exchange rules relating to margin maintenance by (1) failing to require additional margin in accounts holding Trans-Lux stock in view of the high concentration of that stock held by the firm and its consequent inability promptly to liquidate those holdings; and (2) failing to liquidate promptly accounts that were under-margined and did not answer margin calls (C.A. App. A-38 to A-39,

A-41 to A-43).[1] Second, Edwards & Hanly is charged with subjecting its customers to undue financial risk by violating exchange "know your customer" rules and exchange rules requiring members to supervise accounts handled by registered representatives (C.A. App. A-39).[2]

Contrary to exchange rules, throughout the relevant period Edwards & Hanly is alleged to have calculated the required margin with respect to Trans-Lux stock held in customer accounts at the minimum 25% of current market value for that stock, without requiring additional margin as the concentration of Trans-Lux stock increased in customer accounts (C.A. App. A-38, A-41 to A-42). In May 1973, due to a decline in market price of Trans-Lux stock, Edwards & Hanly requested additional margin deposits

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[1] In general, exchange rules required margin in an amount equal to 25% of the market value of all securities "long" in the account. NYSE R. 431(b)(1); Amex R. 462(b)1. Market value for margin purposes was calculated on the basis of current market prices for the securities. The rules provided, however, that "substantial additional margin must be required in all cases * * * where the amount carried is such that it cannot be liquidated promptly." NYSE R. 431(d); Amex R. 462(d)1. Exchange rules also required that necessary margin "be obtained as promptly as possible and in any event within a reasonable time." NYSE R. 431(d)(6); Amex. R. 462(d)6.

Pertinent exchange rules in effect during the relevant period are reprinted in the statutory addendum to the petitioner's brief in the court of appeals.

[2] In general, these rules required member firms to use due diligence to learn the essential facts concerning each customer in order to ascertain the suitability of investment recommendations. NYSE R. 405(1); Amex R. 411. Designated compliance officers of firms were required to "supervise[] diligently all accounts handled by registered representatives of the organization." NYSE R. 405(2); Amex R. 411.

from many of its customers, but 28 failed to meet that margin call (*id.* at A-29 to A-30). As a result of a Trans-Lux price decline in July and August 1973, at least 66 Edwards & Hanly customer accounts became under-margined even using the 25% margin calculation (*id.* at A-30). Contrary to exchange rules, Edwards & Hanly did not liquidate a substantial block of Trans-Lux stock held in those accounts until January 1974, some five months later, when it sold a block of more than 140,000 shares at a substantial loss (*id.* at A-31 to A-34, A-42). After the firm credited customer accounts with the proceeds of the sale, there was still an aggregate debit balance in excess of $500,000 in the accounts liquidated (*id.* at A-34). The complaint alleges that the failure of the NYSE and the Amex to order Edwards & Hanly to liquidate the accounts when they became under-margined and the customers failed to answer margin calls resulted in damage to the plaintiff class (*id.* at A-42 to A-43, A-53).

The complaint alleges also that through periodic inspections by the NYSE the respondents became aware of the increasing concentration of Trans-Lux stock held by Edwards & Hanly and its customers at least as early as January 1971 (C.A. App. A-23, A-25, A-28 to A-29, A-40 to A-41). NYSE examiners noted the high concentration of Trans-Lux stock in Edwards & Hanly accounts in reports prepared in March 1971, April 1972, and September 1973; this information was provided to Edwards & Hanly and the Amex (*id.* at A-23, A-25, A-28 to A-29, A-33, A-41).[3] In August 1973 Edwards & Hanly itself

[3] The Amex authorized the NYSE to act as its agent in conducting periodic inspections and in supervising Edwards & Hanly (C.A. App. A-41).

informed both the NYSE and Amex that it believed at least 50 of the firm's under-margined accounts could not be expected to meet margin calls (*id.* at A-30). Nevertheless, both the firm and the exchanges failed to take any action with respect to the concentration of Trans-Lux stock until September 1973 when the NYSE requested that Edwards & Hanly provide a statement concerning the concentration of Trans-Lux stock, including an explanation of the reason why the firm had not sent out margin calls when margin deficiencies first arose (*id.* at A-23, A-25, A-31). Edwards & Hanly failed to provide the requested information (*ibid.*). Finally, in October 1973, the NYSE assigned a zero value to all Trans-Lux stock held by Edwards & Hanly, precipitating margin deficiencies in 134 Edwards & Hanly customer accounts (*id.* at A-32).

2. After granting class certification, the district court dismissed the Section 6 claim on the ground that "neither the language nor the legislative history of [the] Exchange Act § 6 points to the conclusion that Congress intended to create a private cause of action under that section" (Pet. App. A91).

The court of appeals agreed with the district court's conclusion. Because all relevant events occurred before the end of 1974, the court applied (Pet. App. A12) Section 6 as it read prior to its revision in the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97, 104. The court relied principally on the four-factor test enunciated in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), for determining whether Congress has created an implied private right of action (Pet. App. A12). The court of appeals found the first *Cort* criterion satisfied, recognizing "there can be no doubt that § 6 was enacted

for the '*especial* benefit' of investors" (*id.* at A15). But, under the second *Cort* factor, the court concluded that Congress did not intend to create an implied remedy in enacting the statute in 1934 (*id.* at A16). The court found an absence of evidence on the issue in the 1934 legislative history of the Securities Exchange Act, but noted that Congress created express private rights of action in Sections 9(e), 16(b) and 18 of the Act, 15 U.S.C. 78i(e), 78p(b) and 78r, and viewed that "express provision of private remedies * * * as strong evidence of congressional intent not to create additional private remedies by implication" (Pet. App. A16). With respect to the third *Cort* factor, the court of appeals found that the implied remedy was inconsistent with the underlying purposes of the statutory scheme (*id.* at A16-A22). The court reached this conclusion based on its belief that in 1975 Congress had rejected an SEC proposal to give it direct authority to enforce self-regulatory organization rules, inferring from that rejection a congressional intent to deny private enforcement as well (*id.* at A17-A19). The court further concluded that it would be inconsistent with the concept of self-regulation for courts to permit private individuals to bring suit against exchanges for failure to enforce their rules (*id.* at A19-A21).

The court of appeals also rejected plaintiff's alternative argument, based on Congress' enactment of the 1975 Amendments, that the legislative ratification reasoning of *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), controlled. First, the court stressed that all of the events underlying petitioner's action occurred prior to enactment of those Amendments. The court thus concluded that this case is controlled by the un-

amended statute, stating that "[a]lthough the 1975 debate is a matter of relevant historical fact and thus appropriate to our consideration of Congress' evaluation of SEC sanctions, we do not think it proper to find by reference to the actions of its 1975 successor that Congress in 1934 intended to create a remedy by implication" (Pet. App. A22).

The court of appeals also rejected petitioner's assertion that "numerous court decisions" had recognized an implied remedy under Section 6 prior to 1975. The court stated that its own research disclosed only one appellate decision prior to 1975 that had recognized such a remedy, *Baird* v. *Franklin*, 141 F.2d 238 (2d Cir.), cert. denied, 323 U.S. 737 (1944), and that only one other reported decision permitted a plaintiff to go to trial on a Section 6 claim, *Pettit* v. *Amex*, 217 F. Supp. 21 (S.D.N.Y. 1963). Thus, in contrast to the situation in *Curran*, where this Court had found a sufficient "consensus" of judicial authority supporting an implied private right of action against commodities exchanges under the Commodity Exchange Act to infer congressional ratification of that remedy through the comprehensive amendments to that Act in 1974, the judicial foundation for the implied remedy against stock exchanges was not "equally [as] uniform and well understood" (Pet. App. A24, quoting *Curran*, *supra*, slip op. 26).

Finally, the court of appeals observed that in *Curran* this Court had been able to find affirmative evidence in the legislative history of the 1974 Amendments to the Commodity Exchange Act that Congress intended to preserve the implied remedy in question. By contrast, here, there was no affirmative indication in the legislative history of the Securities Acts Amendments of 1975 that "Congress was even aware

of—much less intended to preserve"—an implied right of action under Section 6 (Pet. App. A24).

Given what it characterized as a "dearth of judicial authority and the absence of any evidence in the legislative history that Congress was even aware of the *Baird* and *Pettit* decisions," the court could not find that an implied right of action under Section 6 was "a part of the 'contemporary legal context' in which Congress legislated" in 1975 (Pet. App. A24). The court thus rejected the *Curran* analogy and affirmed the dismissal of the Section 6 claim.

DISCUSSION

Public investors have an implied private right of action under Section 6 of the Securities Exchange Act of 1934 against a registered national securities exchange for damages caused by the exchange's failure to enforce its rules. The Third Circuit's conclusion that no such implied private right existed prior to the Securities Acts Amendments of 1975 conflicts with decisions of other courts of appeals and is inconsistent with decisions of this Court. Since 1944, the federal courts have routinely and consistently recognized that Section 6 affords a private right of action against securities exchanges. In a virtually unbroken line of some 30 decisions in the circuit and district courts over the last 40 years (see note 8, *infra*), this private remedy has uniformly been made available to investors by courts relying on the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), and, previously, on *Texas & P. Ry.* v. *Rigsby*, 241 U.S. 33 (1916). Indeed, not until the decision by the Third Circuit in this case had a court of appeals held to the contrary. Nevertheless, because the facts underlying this case occurred prior to the Securities Acts

Amendments of 1975, a decision by this Court would not necessarily resolve the question of implied rights under the current statute. Since future cases will arise in the post-amendment setting and will accordingly be governed by the analysis prescribed in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), this Court need not intervene to reach a decision that may have only limited precedential value.

1. In 1934, at the time the Securities Exchange Act was enacted, the implication of private rights under a federal statute was governed by this Court's decision in *Texas & P. Ry.* v. *Rigsby*, *supra*. Under *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, *supra*, slip op. 24, "the initial focus must be on the state of the law at the time the legislation was enacted." Thus, the *Rigsby* approach to implied rights governs if the statute antedates this Court's decision in *Cort* v. *Ash*, *supra*.[4] *Rigsby* called for the implication of a private right of action for damages caused by breach of a statutory duty in favor of the members of a class for whose protection the statute was enacted. The prerequisites for recognizing an implied right of action under *Rigsby* are clearly met here: An exchange has a duty to enforce its rules under Section 6 and that provision was enacted to protect a class of consumers—public investors.[5] See *Baird* v. *Franklin*, 141 F.2d 238, 244-245 (2d Cir.), cert. denied, 323 U.S. 737 (1944).

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[4] *Rigsby* was the governing standard not only in 1934, but also when the Securities Acts Amendments of 1975 were enacted on June 4, 1975, some two weeks before this Court's decision, on June 17, 1975, in *Cort* v. *Ash*, *supra*.

[5] The courts have disagreed on the question whether persons other than public investors who are injured by an exchange's

2. Recognition of a private remedy in these circumstances is also consistent with the four-part test announced in *Cort* v. *Ash*, *supra*, 422 U.S. at 78. Even the court of appeals acknowledged that the first *Cort* factor is met here—investors are the especial beneficiaries of the statute. See 15 U.S.C. (1970 ed.) 78f(d). The court of appeals' application of the remaining *Cort* standards is, however, flawed.

With regard to the second *Cort* factor (congressional intent), the court of appeals found the absence of an affirmative legislative intent to create a private damages remedy persuasive. But such a negative inference from congressional silence is unwarranted. This Court's decisions instruct that in situations such as the present one, "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling." *Cannon* v. *University of Chicago*, 441 U.S. 677, 697 (1979), quoting *Cort* v. *Ash*, *supra*, 422 U.S. at 82 (emphasis in original). See also *Curran*, *supra*, slip op. 23. The court of appeals also discerned an affirmative congressional intent to deny other private remedies from the express actions provided in Sections 9(e), 16(b) and 18 of the Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78p(b) and 78r. That type of analysis was squarely rejected in this Court's recent decision in *Herman & MacLean* v. *Huddleston*, No. 81-680 (Jan. 24, 1983). Pointing to language in the savings clauses found in both Section 16 of the

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failure to enforce its rules are within the protected class. Compare *Lank* v. *NYSE*, 548 F.2d 61 (2d Cir. 1977), with *Hughes* v. *Dempsey-Tegeler & Co.*, 534 F.2d 156 (9th Cir.), cert. denied, 429 U.S. 896 (1976).

Securities Act of 1933, 15 U.S.C. 77p, and Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78bb(a), this Court concluded that "Congress rejected the notion that the express remedies of the securities laws would preempt all other rights of action." *Herman & MacLean, supra*, slip op. 8. Rather, the Court continued, these savings clauses "confirm that the remedies in each Act were to be supplemented by 'any and all' additional remedies." *Ibid.*

With respect to the third *Cort* factor, consistency with legislative purpose, the court of appeals erred in concluding that private actions for enforcement of exchange rules would disrupt the self-regulatory system. Given the limited resources of the SEC, the agency charged with enforcement of the securities laws, private actions against securities exchanges operate as a necessary supplement to governmental enforcement authority. Cf. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 706-708. Further, such private actions provide a vehicle through which persons injured by exchange dereliction may obtain damages, a remedy that the SEC's enforcement actions cannot provide. Finally, as this Court pointed out in *Curran* with respect to commodities exchanges, the threat of such private actions operates as an important stimulant to diligence by exchanges in enforcement of their rules. See *Curran, supra*, slip op. 30. Thus, permitting these private actions is, as this Court recently emphasized in *Herman & MacLean*, consistent with "Congress' stated * * * purpose * * * 'to impose requirements necessary to make [securities] regulation and control reasonably complete and effective.'" Slip op. 10.[8]

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[8] The court of appeals also grounded its conclusion that implied remedies are inconsistent with the statutory purpose on

Finally, with respect to the fourth *Cort* criterion, not considered by the court of appeals, private recovery against exchanges is not a matter traditionally relegated to state law. Congress enacted the Securities Exchange Act because transactions in securities conducted on securities exchanges are "affected with a national public interest." Section 2, 15 U.S.C. 78b. It adopted this legislation precisely because state law had failed adequately to curb injurious practices in securities transactions on exchanges.

3. The court of appeals' analysis is equally flawed in its treatment of the Securities Acts Amendments of 1975 (Pet. App. A22). This Court's decision in *Herman & MacLean, supra*, slip op. 9-10, makes clear that legislative action may be relevant to the existence of an implied right, even though that legislation was enacted after the events on which the complaint is based. There, in a case involving events that occurred in 1969, this Court concluded that Congress' decision in 1975 to leave intact the statutory provision relevant in that case (Section 10(b), 15 U.S.C. 78j(b)), suggests that Congress approved existing judicial interpretations allowing a private right of action under that provision. That principle is fully applicable here,[7] because, notwithstanding what was said by the

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Congress' supposed rejection of a proposal to permit direct enforcement by the SEC of exchange rules in the Securities Acts Amendments of 1975 (Pet. App. A24 n.12). The court apparently was unaware of the amendments to Section 21(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(d), that gave the SEC precisely that authority by expanding the misconduct for which the Commission may institute injunctive actions to include violations of self-regulatory organization rules.

[7] Congress did not meaningfully alter Section 6 of the Securities Exchange Act of 1934, the provision at issue here, in the 1975 Amendments to the Act. Prior to that legislation,

court of appeals (Pet. App. A23), between 1944 and 1975 an implied private right under Section 6 had been expressly recognized or assumed to exist in 15 cases, including the decisions of two courts of appeals.[8] Thus, private actions under Section 6 have a

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the rules of a registered exchange were required to provide for the disciplining of members for violation of rules or regulations under the Act and to be "just and adequate * * * to protect investors * * *." Sections 6(b) and (d), 15 U.S.C. (1970 ed.) 78f(b) and (d). If an exchange failed to enforce its rules "so far as within its power," the Commission could suspend or withdraw the registration of the exchange. Section 19(a)(1), 15 U.S.C. (1970 ed.) 78s(a)(1).

As amended in 1975, the statute requires that a registered exchange "enforce compliance by its members * * * with the provisions of [the Act], the rules and regulations thereunder, and the rules of the exchange." Section 6(b), 15 U.S.C. 78f(b). An exchange is required to enforce compliance "absent reasonable justification or excuse," and the Commission is authorized to bring an injunctive action against persons who violate exchange rules. Sections 19(g)(1) and 21(d), 15 U.S.C. 78s(g)(1) and 78u(d).

[8] *Hochfelder* v. *Midwest Stock Exchange*, 503 F.2d 364, 367-372 (7th Cir.), cert. denied, 419 U.S. 875 (1974); *Butterman* v. *Walston & Co.*, 387 F.2d 822 (7th Cir. 1967), cert. denied, 391 U.S. 913 (1968); *Colonial Realty Corp.* v. *Bache & Co.*, 358 F.2d 178, 181 (2d Cir.), cert. denied, 385 U.S. 817 (1966); *O'Neill* v. *Maytag*, 339 F.2d 764, 770 (2d Cir. 1964); *Baird* v. *Franklin*, 141 F.2d 238, 239 (2d Cir.), cert. denied, 323 U.S. 737 (1944); *NYSE* v. *Sloan*, 394 F. Supp. 1303, 1310-1311 (S.D.N.Y. 1975); *Phillips* v. *Amex*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,035, at 97,616 (S.D.N.Y. Mar. 27, 1975); *Rich* v. *NYSE*, 379 F. Supp. 1122, 1126 (S.D.N.Y. 1974); *Steinberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, [1973-1974 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,599 (S.D.N.Y. June 14, 1974); *Marbury Management, Inc.* v. *Alfred Kohn, Wood, Walker & Co.*, 373 F. Supp. 140, 142 (S.D.N.Y. 1974); *Hughes* v. *Dempsey-*

longer history than those under Rule 10b-5 or the

Tegeler & Co., Inc., [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,133, at 94,539 (C.D. Cal. 1973), aff'd 534 F.2d 156, 166 (9th Cir.), cert. denied, 429 U.S. 896 (1976); *Caddell* v. *Goodbody & Co.*, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,938 (N.D. Ala. Dec. 6, 1972); *Weinberger* v. *NYSE*, 335 F. Supp. 139, 144 (S.D.N.Y. 1971); *Bright* v. *Philadelphia-Baltimore-Washington Stock Exchange*, 327 F. Supp. 495, 500-506 (E.D. Pa. 1971); *Kroese* v. *NYSE*, 227 F. Supp. 519, 520 (S.D.N.Y. 1964); *Pettit* v. *Amex*, 217 F. Supp. 21, 29-30 (S.D.N.Y. 1963).

An additional 13 cases have recognized such a private right of action on behalf of investors subsequent to the 1975 Amendments: *Murphy* v. *McDonnell & Co.*, 553 F.2d 292, 295 (2d Cir. 1977); *Arneil* v. *Ramsey*, 550 F.2d 774, 783 (2d Cir. 1977); *Lank* v. *NYSE*, 548 F.2d 61, 66-67 (2d Cir. 1977); *Rich* v. *NYSE*, 509 F. Supp. 87 (S.D.N.Y. 1981); *Smith* v. *Smith, Barney, Harris, Upham & Co.*, 505 F. Supp. 1380, 1384-1385 (W.D. Mo. 1981); *P.J. Taggares & Co.* v. *New York Mercantile Exchange*, 476 F. Supp. 72, 78 n.31 (S.D.N.Y. 1979); *Verace* v. *NYSE*, 478 F. Supp. 1061, 1064-1065 (S.D.N.Y. 1979); *Aldrich* v. *NYSE*, 446 F. Supp. 348, 354 (S.D.N.Y. 1977); *Rolf* v. *Blyth Eastman Dillon & Co., Inc.*, 424 F. Supp. 1021 (S.D.N.Y. 1977), aff'd in part, 570 F.2d 38 (2d Cir.), cert. denied, 439 U.S. 1039 (1978); *Carr* v. *NYSE*, 414 F. Supp. 1292, 1297 (N.D. Cal. 1976); *Evans* v. *Kerbs & Co.*, 411 F. Supp. 616, 625 (S.D.N.Y. 1976); *Fischer* v. *NYSE*, 408 F. Supp. 745, 757 (S.D.N.Y. 1976); *Collins* v. *Philadelphia-Baltimore-Washington Stock Exchange, Inc.*, 408 F. Supp. 1344, 1349 (E.D. Pa. 1976).

In addition to the present case, we have found only one exception to this long line of cases—a recent district court decision, *Pittsburgh Terminal Corp.* v. *Baltimore & O. R.R.*, 509 F. Supp. 1002, 1015 (W.D. Pa. 1981), rev'd on other grounds rendering the Section 6 implied right issue moot, 680 F.2d 933, 943 (3d Cir. 1982), cert. denied, No. 82-622 (Nov. 29, 1982).

In many of these cases, the exchanges prevailed on the merits or on defenses unrelated to the existence of a private right of action; thus, the recognition of a private remedy has

Commodity Exchange Act ("CEA");[9] in addition, such private actions had been recognized even more "routinely and consistently" than actions under the CEA (see *Curran*, *supra*, slip op. 25, 38 n.94).

It follows, we submit, that a private right of action in the situation presented here existed before the enactment of the Securities Acts Amendments of 1975. But, whatever doubts there may be concerning the correctness of the earlier decisions, it seems perfectly clear what the law has been since 1975. While the 1975 Amendments do not directly address private rights of action under Section 6,[10] that is hardly sur-

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not resulted in the precipitous imposition of liability. In addition, some cases have assumed without analysis that a private right exists or simply addressed the merits without mentioning this predicate issue. This was also the case in *Curran* and thus does not in any way undercut the conclusion that the judicial consensus concerning Section 6 was "uniform and well understood." *Curran*, *supra*, slip op. 26.

The courts have identified three elements of a Section 6 cause of action—that the exchange knew or had reason to believe that its member was violating exchange rules, that the exchange thereafter unreasonably failed to take appropriate action, and that the exchange's dereliction caused the plaintiff's loss. See, *e.g.*, *Hughes* v. *Dempsey-Tegeler & Co.*, *supra*, 534 F.2d at 170; *Hochfelder* v. *Midwest Stock Exchange*, *supra*, 503 F.2d at 368; *Baird* v. *Franklin*, *supra*, 141 F.2d at 239. We express no view as to whether the petitioner in this case would be able to prove each element of the cause of action.

[9] *Baird* v. *Franklin*, *supra*, was decided some two years prior to *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (Rule 10b-5), and 23 years before *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967) (CEA). The SEC filed an amicus brief in *Baird* arguing that Section 6 affords a private right of action to public investors.

[10] There is some recognition in the legislative history of the 1975 Amendments of the exchanges' potential liability for

prising. By that time, the courts had routinely and consistently recognized an investor's right of action against an exchange (see note 8, *supra*). In this "contemporary legal context" (see *Curran*, *supra*, slip op. 25), Congress must be deemed to have ratified those judicial decisions and preserved the private remedy. As this Court observed in *Curran*, when Congress amends a statute at a time when an implied private remedy has been recognized by the courts, the inquiry is necessarily different from that involving new legislation (slip op. 24-25): "Congress need not have intended to create a new remedy, since one already existed; the question is whether Congress intended to preserve the pre-existing remedy." Moreover, "the fact that a comprehensive reexamination and significant amendment of the [Act] left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Curran*, *supra*, slip op. 28 (footnote omitted).

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damages in private suits under Section 6. In 1973, the Securities Industry Study was issued, reporting on the SEC's request for additional authority to oversee the rules of national securities exchanges. Staff of the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., *Securities Industry Study* 173 (Comm. Print 1973) ("*Securities Industry Study*"). The study, which was the genesis for the 1975 Amendments, S. Rep. No. 94-75, 94th Cong., 1st Sess. 1 (1975), discussed a NYSE rule apparently adopted as a consequence of the potential for exchange liability under Section 6. The rule "required a member to indemnify the Exchange for expenses and damages, in the event of any legal proceeding brought to impose 'secondary liability' on the Exchange for a failure on its part 'to prevent or require action' by the member." *Securities Industry Study*, *supra*, at 173.

Thus, even if the court of appeals' decision in this case is not reversed, it cannot affect the law for the future. Since 1975, the private right of action must be deemed established by congressional ratification of the unbroken line of cases that existed when Congress revisited the statutory scheme. That line of authority is even stronger than that which informed this Court's decision in *Curran*. Indeed, the seminal decision in *Baird* v. *Franklin*, *supra*, recognizing a private right of action against securities exchanges provided the doctrinal underpinning for later cases recognizing such actions against commodities exchanges, under the CEA. *Baird* was expressly relied upon in *Leist* v. *Simplot*, 638 F.2d 283, 310 (2d Cir. 1980) (aff'd by this Court as a companion case in *Curran*), and in *Seligson* v. *New York Produce Exchange*, 378 F. Supp. 1076, 1084-1085 (S.D.N.Y. 1974), aff'd *sub nom. Miller* v. *New York Produce Exchange*, 550 F.2d 762 (2d Cir.), cert. denied, 434 U.S. 823 (1977). With this historical background, it would be wholly anomalous for actions against commodities exchanges to be preserved and the judicial framework from which those actions were in part derived to be rejected.

In our view, therefore, a faithful application of *Curran* to Section 6 would uphold a private right of action in future cases. The decision below, which does not purport to determine the rule since 1975, should not enjoy continuing vitality. In light of the principles enunciated in *Curran* and *Herman & MacLean*, there is every reason to believe that the prevailing rule will continue to govern in the future. In any event, should a conflict emerge among the circuits in a case arising after the 1975 Amendments, this Court could review the issue at that time in a context that would have greater precedential value. Accordingly,

although we believe the decision below is incorrect, it does not warrant the exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

ELISSE B. WALTER
Assistant General Counsel

RICHARD A. KIRBY
Senior Special Counsel
Securities and Exchange Commission

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